IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 780 OF 2004

Rama Hariba Khavale,
(since deceased, through heirs
and legal representatives)
Pandit Rama Khavale & Ors. ...Appellants

Versus

Gopika Ramling Surwase & Ors. ...Respondents

.....

Mr. S.D. Sharmadhikari, Advocate for Appellants

Smt. Aniketa Aher-Sawant Advocate for Respondent Nos. 1 and 2..

Mr. P.R. Arjunwadkar, Adv. for Respondent No.4.

.....

CORAM: A.S. OKA, J.

DATED: 12TH JANUARY, 2005

P.C.:-

1. Heard the learned counsel appearing for the parties.

2. This Second Appeal is filed by the original Defendants. The trial Court has passed a decree for partition and separate possession. The decree was challenged by preferring an appeal before the District Court.

3. The learned counsel appearing for the Appellants submitted that whether the original Defendant No.1

was holding agricultural land as a tenant in his individual capacity or whether he was holding the said land on behalf of the joint Hindu family, could have been decided only by the Agricultural Lands Tribunal established under the Bombay Tenancy and Agriculture Lands Act, 1948 in view of the provisions of section 85 and 85-A of the said Act, 1948. He relied upon the judgment of the learned Single Judge of this Court reported in **2003(4) Bom.C.R. 365 in the case of Rama Dhondu Date Vs. Krishnaji Bhikaji Kadam & Ors.** He invited my attention to the application made by the Appellants before the District Court at Exh.13 in which a prayer was made for framing following issue;

> Whether the Plaintiff proved that the Joint family of the defendant 112 and the deceased Ganpati was the tenant of the land S.No.238/1, Now part of the G.No.58/0 of Pangari Tal. Barshi.

4. A prayer was also made for referring the said issue to the competent Court. By order dated 4.3.1991 the learned Additional District Judge rejected the said application by holding that it is not necessary to frame the issue as suggested and to

send it to the competent Court for decision. The Appellant challenged the said order by filing Writ Petition No.4431 of 1991 in this Court. By order dated 26.6.2003, the learned Single Judge of this Court dismissed the Petition.

5. The learned counsel for the Appellants submitted that though writ petition was dismissed, the contention whether the trial Court ought to have framed the issue of tenancy was kept open and the Appellants were permitted to agitate the said issue in the appeal pending before the District Court. He has also invited my attention to paragraph Nos. 14 and 15 of the judgment of the learned Single Judge of this Court which reads thus:-

> "14. In the instant case the trial Court had framed the following issues:-
>
> (2) Do plaintiffs prove that price of the land Gat No.570 was paid from out of joint family funds of deceased Ganpati and the defendants?
>
> (6) Does Defendant No.1 prove that he paid the price for the land Gat No.570 from out

of his own funds and not from any joint family funds?

Evidence was led. The trial court after perusing the evidence held that defendant No.1 /the petitioner had failed to prove that he had paid the price of the land in question out of his funds and the plaintiffs had proved that price of the said land was paid from the joint family funds of deceased Ganpati and the defendants. The trial court observed that admittedly the family was joint and the petitioner was the "Karta" and manager of the family. The petitioner had failed to prove his separate source of income. The plaintiff had proved the existence of nucleus of joint family. Since the petitioner’s appeal is pending I do not want to express any opinion on the merits of his case. But admittedly during the trial of the suit no application was made praying that an issue he framed and referred to the tenancy Court. In the application made belatedly at the appellate stage it is stated that the trial court’s judgment is vitiated because the issue regarding the tenancy was not framed and referred to the tenancy court. If the trial

court’s order is bad a alleged by the petitioner his remedy is to file an appeal. he has in fact failed an appeal. hence there is no warrant for entertaining such application.

15. For the reasons stated in the preceding paragraphs, the petition will have to be dismissed. However, the appeal filed by the petitioner is pending and observations made by me in this judgment should not have any adverse effect on it. Hence it is clarified that his court has not expressed any opinion on the merits of the case and the court dealing with it shall decide it independently."

6. The learned counsel for the Appellants has further submitted that the appellate Court committed an error while interpreting the order of this court. He submitted that the appellate Court proceeded on erroneous assumption that the order of this Court amounts to confirmation of order dated 4.3.1991 on merits. He, therefore, submitted that the appellate Court committed an error by not considering the grievance of the Appellants regarding the failure of the trial Court to frame the issue and to refer the same to the Tenancy Court.

7. The second contention of the learned counsel for the Appellants is that it was obvious that the land in question was the self acquired property of original Defendant No.1 and as the tenancy was created in his name, there was no question of holding that the original Defendant No.1 was holding the property on behalf of the joint family.

8. I considered both the submissions. By order dated 4.3.1991 the learned Additional District Judge recorded a clear finding that it was not necessary to frame the issue as prayed for by the Appellants and refer the same to the Tenancy Court. The perusal of the judgment and order dated 26.6.2003 of the learned Single Judge of this Court does not show that the issue raised in the application at Exh.13 was kept open and was permitted to be re-agitated in the pending appeal at the time of final hearing of the appeal. No opinion has been expressed on the merits of the pending appeal. Nevertheless, the petition was dismissed and the order dated 4.3.1991 was confirmed. Unless the issue raised in the application at Exh.13 was expressly kept open after dismissal of the said writ petition, it was not open for the appellant to agitate the contention raised in application at Exh.13 at the time of final hearing of the appeal. In my view, the appellate Court has correctly interpreted the order of the learned Single

Judge of this Court.

9. In so far as the second contention is concerned, there is a clear finding that there existed a joint family and there was a nucleus in the form of immovable property from which the land in question could have been acquired. There are concurrent findings of fact on this aspect. The said findings are based on oral and documentary evidence on record. The said findings cannot be interfered in appeal under Section 100 of the Code of Civil Procedure, 1908.

10. Hence, there is no merit in the Appeal and the same is dismissed with no order as to costs.

11. At this stage the learned advocate for the Appellants prays that the trial Court be directed not to execute the decree for a period of 12 weeks from today. The said request is opposed by the advocate appearing for the Respondents. Considering the facts and circumstances of this, I direct that for a period of eight weeks from today, the Appellants shall not be dispossessed on the basis of the impugned judgment and decree. It is made clear that further proceedings on the basis of decree will go on during the said period of eight weeks.

12. Certified copy is expedited.